

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

RACHEL BURD,

Plaintiff,

v.

BANK OF NEW YORK MELLON,

Defendant.

Case No. 2:13-cv-00705-KJD-NJK

**ORDER**

Before the Court is Defendant Bank of New York Mellon's Motion to Dismiss (#6). Plaintiff filed a response in opposition (#9) to which Defendant replied (#10).

**I. Background**

On December 23, 2005, Plaintiff signed a deed of trust and promissory note for \$241,950 in favor of Republic Mortgage, LLC dba Republic Mortgage in connection with real property located at 213 Silver Rings Avenue, North Las Vegas, NV 89031. The deed of trust named Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary and North American Title Company as the trustee.

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1 On March 23, 2010, MERS executed a Corporation Assignment of Deed of Trust and  
 2 assigned the deed of trust to Defendant Bank of New York Mellon. Def. Mot. to Dis., Ex. B.  
 3 Defendant named ReconTrust Company, N.A. (“ReconTrust”) as the new trustee on the same day.  
 4 Def. Mot. to Dis., Ex. C. On March 24, 2010, ReconTrust recorded Plaintiff’s payment default in a  
 5 notice of default/election to sell. Def. Mot. to Dis., Ex. D. On September 17, 2010, ReconTrust  
 6 recorded the notice of trustee’s sale and a Nevada foreclosure mediation certificate, which indicated  
 7 that Plaintiff either waived or did not request mediation. Def. Mot. to Dis., Ex. F, E. Three months  
 8 later, the home was foreclosed and ReconTrust recorded a trustee’s deed upon sale on December 30,  
 9 2010. Def. Mot. to Dis., Ex. G.

10 On February 4, 2013, Plaintiff filed her complaint. Defendant then filed this Motion to  
 11 Dismiss for failure to state a claim (#6).

## 12 II. Legal Standard for a Motion to Dismiss

13 Federal Rule of Civil Procedure 41(b) states that if a plaintiff “fails to . . . comply with these  
 14 rules . . . a defendant may move to dismiss the action or any claim against it.” When a motion to  
 15 dismiss is made, the Court must construe the facts in the light most favorable to the non-moving  
 16 party. Wyler Summit Partnership v. Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir.  
 17 1998). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted  
 18 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937,  
 19 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

20 Ashcroft v. Iqbal requires a two-prong analysis of the pleading when considering a motion to  
 21 dismiss. First, the Court identifies “the allegations in the complaint that are not entitled to the  
 22 assumption of truth,” that is, those allegations which are legal conclusions, bare assertions, or merely  
 23 conclusory. Id. at 1949-51. Second, the Court considers the factual allegations “to determine if they  
 24 plausibly suggest an entitlement to relief.” Id. at 1951. Plausibility, in the context of a motion to  
 25 dismiss, means that a plaintiff has pled facts which allow “the court to draw the reasonable inference

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1 that the defendant is liable for the misconduct alleged.” Id. at 1949. If the allegations state non-  
 2 conclusory, plausible claims for relief, such claims survive the motion to dismiss. Id. at 1950.

3 Cases of fraud, however, have a heightened standard of pleading, wherein parties must state a  
 4 claim “with particularity.” FED. R. CIV. P. 9(b). This standard requires the party alleging fraud to  
 5 state “the who, what, when, where, and how of the misconduct charged.” Kearns v. Ford Motor Co.,  
 6 567 F.3d 1120, 1124 (9th Cir. 2009) (citation and internal quotation marks omitted). This heightened  
 7 standard serves several purposes, such as:

8 (1) to provide defendants with adequate notice to allow them to defend the charge and  
 9 deter plaintiffs from the filing of complaints as a pretext for the discovery of unknown  
 10 wrongs; (2) to protect those whose reputation would be harmed as a result of being  
 11 subject to fraud charges; and (3) to prohibit plaintiffs from unilaterally imposing upon  
 the court, the parties and society enormous social and economic costs absent some  
 factual basis.

12 Id. (quoting In re Stac Elecs. Sec Litig., 89 F.3d 1399, 1405 (9th Cir. 1996) (citation and alterations  
 13 omitted)).

### 14 III. Analysis

15 Plaintiff filed a *pro se* complaint which, under the direction of the Supreme Court, “is to be  
 16 liberally construed, and . . . however inartfully pleaded, must be held to less stringent standards than  
 17 formal pleadings drafted by lawyers.” Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citations and  
 18 internal quotation marks omitted). This Court accordingly recognizes the following potential  
 19 allegations in the complaint: (1) securitization, (2) violation of the pooling and servicing agreement  
 20 (“PSA”), (3) quiet title, and (4) misrepresentation and fraud. However, Plaintiff states on pages three  
 21 and four of the Response to the Motion to Dismiss (#9) that she “makes no mention to securitization  
 22 playing any role other than possible motive for misrepresentation[,] . . . in no way mention[s] or  
 23 assert[s] the PSA[,] . . . [and] never mentions or motions to ‘quiet title’.” Accordingly, this Court  
 24 considers only Plaintiff’s allegations of misrepresentation and fraud.

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1        A. Fraud Generally

2        Even construing Plaintiff's *pro se* complaint liberally, Plaintiff fails to state a fraud claim with  
3        particularity as required by Federal Rule of Civil Procedure 9(b). The Supreme Court has held that  
4        "the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S.  
5        41, 48 (1957). Plaintiffs typically accomplish this by providing a short and plain statement identifying  
6        the alleged claims, the relief sought, and how the court has jurisdiction, as outlined under Rule 8(a).  
7        FED. R. CIV. P. 8(a). However, Rule 9(b) states that: "In alleging fraud or mistake, a party must state  
8        with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P 9(b).

9        Plaintiff argues that Rule 8 is the appropriate pleading standard for the present case. However,  
10       the cases Plaintiff cites to support her argument do not involve fraud or mistake allegations.  
11       Allegations of mistake and fraud, like those alleged by Plaintiff, are governed by the higher  
12       particularity standard of Rule 9(b). This particularity standard requires the party alleging fraud to "set  
13       forth more than the neutral facts necessary to identify the transaction" and state "the who, what,  
14       when, where, and how of the misconduct charged." Kearns, 567 F.3d at 1124 (citations and internal  
15       quotation marks omitted).

16       On page two of the complaint, Plaintiff alleges that: "Affiant had a justified reliance on  
17       truthfulness of ownership and proper assignments which was misrepresented by defendant's account  
18       of ownership beneficiary though endorsements, assignments, Notice of Default and Notice of Trustee  
19       sale." Plaintiff does not provide any additional information in the complaint about Defendant's  
20       misrepresentation. To satisfy the particularity standard of Rule 9(b), Plaintiff must do more than  
21       make a broad allegation that Defendant misrepresented endorsements, assignments, and notices.  
22       Plaintiff must allege a specific misrepresentation and state "the who, what, when, where, and how" of  
23       the misrepresentation to properly state a claim of fraud. Id. Plaintiff has not provided circumstances  
24       sufficient to meet the particularity requirement outlined in Rule 9(b) and Kearns.

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1        B. Standing to Foreclose

2        In foreclosure cases, fraud may affect a party's standing to foreclose if there is fraud in the  
 3 assignments or notes. In order to have standing to foreclose on a home in Nevada, the same entity  
 4 must be both the current beneficiary of the deed of trust and the current holder of the promissory  
 5 note. Edelstein v. Bank of N.Y. Mellon, 286 P.3d 249, 255 (Nev. 2012). In Edelstein, the Nevada  
 6 Supreme Court held that, in the event that a promissory note is transferred, the current note holder is  
 7 identified using the Restatement approach, which states that a promissory note and deed of trust are  
 8 automatically transferred together unless the parties agree otherwise. See Id. at 257-258, 260. When a  
 9 subsequent lender seeks to enforce a note, it must present evidence showing endorsement of the note  
 10 either in its favor or in favor of its servicer. Id. at 261.

11        In Exhibits A-G filed with Defendant's Motion to Dismiss (#6)<sup>1</sup>, MERS is listed as the initial  
 12 beneficiary on the Deed of Trust. MERS assigned the Deed of Trust to Defendant through a  
 13 Corporation Assignment of Deed of Trust. Defendant named ReconTrust as the new trustee, who,  
 14 acting as an agent for Defendant, proceeded with the foreclosure process. These documents outline a  
 15 clear line of succession from MERS, the original beneficiary of the deed of trust and promissory note  
 16 holder, to Defendant, who appears to be the current beneficiary and note holder. Accordingly,  
 17 Defendant appears to have standing to foreclose under Edelstein.

18        To establish a claim that Defendant does not, in fact, have standing to foreclose in the present  
 19 case, Plaintiff would need to allege (1) that there is fraud in the assignments and (2) that the deed  
 20 beneficiary and holder of the promissory note are different entities. Plaintiff, however, fails to meet  
 21 the particularity requirements to state a fraud claim and thus fails to allege a foreclosure standing  
 22 claim.

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 24        <sup>1</sup>This Court takes judicial notice of the Exhibits, which are comprised of the original deed of trust, the  
 25 Corporation Assignment of Deed of Trust, substitution of trustee, notice of default/election to sell, foreclosure mediation  
 26 program certificate, notice of trustee's sale, and trustee's deed upon sale, all of which have been recorded in Clark  
 County, thus satisfying Federal Rule of Evidence 201(b)(1). Taking judicial notice of documents under Federal Rule of  
 Evidence 201(b)(1) does not convert this Motion to Dismiss into a motion for summary judgment. See Lee v. City of Los  
Angeles, 250 F.3d 668, 688-689 (9th Cir. 2001).

1        C. Wrongful Foreclosure

2        Apart from the potential allegations recognized previously by this Court, any additional  
3 allegations in Plaintiff's complaint are unclear. For example, on page four of the response, Plaintiff  
4 states that: "The Plaintiff meanwhile argues that the 'collateral' being held in a trust and satisfied,  
5 then moved for execution." On page three of the complaint Plaintiff also states that: "The property  
6 was sold at a foreclosure sale on executing the previously satisfied collateral whilst further Discovery  
7 reveals proof of satisfaction of Trust coupled with repeated attempts through falsified assignments  
8 prior to actual sale date." The Court, however, continues to construe Plaintiff's *pro se* complaint  
9 liberally. Although not entirely apparent, Plaintiff's fraud allegations possibly suggest an underlying  
10 issue of wrongful foreclosure.

11        In order to maintain a tort claim of wrongful foreclosure in Nevada, Plaintiff must show,  
12 among other things, that she was not in default at the time of foreclosure. See Collins v. Union Fed.  
13 S&L Ass'n, 99 Nev. 284, 304 (Nev. 1983). Plaintiff does not allege in the complaint that she was not  
14 in default. Therefore, Plaintiff fails to state a claim of wrongful foreclosure.

15        IV. Amendment

16        Over the course of Plaintiff's complaint, Plaintiff has failed to state a claim of fraud, standing  
17 to foreclose, or a wrongful foreclosure. However, in light of the *pro se* nature of the complaint, this  
18 Court will allow Plaintiff to file an amended complaint within fourteen (14) days of the entry of this  
19 order. The amended complaint must state either a fraud claim that satisfies the particularity  
20 requirement of Federal Rule of Civil Procedure 9(b) or a wrongful foreclosure claim that fulfills the  
21 plausibility standard outlined by Twombly.

22        This Court reminds Plaintiff that the amended complaint will be subject to Federal Rule of  
23 Civil Procedure 11. Rule 11 places on Plaintiff the burden of conducting a reasonable inquiry into the  
24 facts and the law before filing. Bus. Guides, Inc. v. Chromatic Communs. Enters., 498 U.S. 533, 551  
25 (1991). If Plaintiff submits an amended complaint that a reasonable inquiry into the facts would have

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1 revealed to be without merit, Plaintiff may be subject to the sanctions outlined in Rule 11(c),  
2 including monetary sanctions. See Id. at 550.

3 V. Conclusion

4 Accordingly, **IT IS HEREBY ORDERED** that Defendant Bank of New York Mellon's  
5 Motion to Dismiss (#6) is **GRANTED**;

6 **IT IS FURTHER ORDERED** that Plaintiff file an amended complaint satisfying the  
7 particularity requirement of Rule 9(b) or plausibly allege wrongful foreclosure in response to the  
8 Court's order within fourteen (14) days of the entry of this order.

9 DATED this 12<sup>th</sup> day of June 2013.

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13 Kent J. Dawson  
14 United States District Judge  
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